IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

RECEIVED
NOV 3 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 79-5949 and 79-5951

JOHN GREGORY WATKINS,

Petitioner,

V.

ORIGINAL COPY

DONALD E. BORDENKIRCHER, WARDEN,

Respondent;

and

JAMES WILLARD SUMMITT,

Petitioner,

V.

DONALD E. BORDENKIRCHER, WARDEN,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

FRANK W. HEFT, JR.
Chief Appellate Defender of the
Jefferson District Public Defender
200 Civic Plaza
701 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800
Counsel for Petitioners

DANIEL T. GOYETTE
Chief Deputy Public Defender
Jefferson District Public Defender
of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Nos. 79-5949 and 79-5951

JOHN GREGORY WATKINS,

Petitioner,

V.

DONALD E. BORDENKIRCHER, WARDEN,

Respondent;

and

JAMES WILLARD SUMMITT,

Petitioner,

V.

DONALD E. BORDENKIRCHER, WARDEN,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

QUESTION PRESENTED

DOES CONSTITUTIONAL DUE PROCESS OF LAW REQUIRE A TRIAL COURT TO CONDUCT A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE THE ADMISSIBILITY OF IDENTIFICATION EVIDENCE?

PURPOSE OF THE BRIEF

The petitioners, John Gregory Watkins and James Willard Summitt, respectfully submit that the legal arguments supporting their position on the issue presented are adequately set forth in the brief for the petitioners. However, the petitioners find it necessary to respond to Subsection D of the argument made in brief for the respondent. This reply brief seeks to demonstrate that an analysis of the factors enunciated in Neil v. Biggers, 489 U.S. 188 (1972) indicates the unreliability of the identifications made by witnesses in the respective cases.

No. 79-5949 - WATKINS V. BORDENKIRCHER

1.) The opportunity of the witnesses to view the criminal at the time of the crime.

Walter Smith, who was working at the liquor store counter at the time of the robbery, said that four men came into the store and he was asked for a pack of cigarettes by one of the men. As Smith turned around to get the cigarettes the man said, "This is a hold-up." (Appendix, hereafter App., p. 7). According to Smith, Donald Goeing, an employee of the store, had been stocking a cooler and when Goeing made a movement, he was immediately shot twice. The men then ran out of the door (App., pp. 7-10).

Goeing said he saw his assailant's face for about five seconds as he turned around from the cooler and was shot. He then passed out (App., p. 20).

2.) The witnesses's degree of attention.

Smith and Goeing both said that the assailant was a stranger and they had no reason to pay particular attention to him (App., pp. 8, 19-20).

3.) The accuracy of the prior description.

Smith described the assailant as a light-skinned, black male, about thirty years old, approximately five feet, nine inches tall.

He stated that the assailant wore a light-colored shirt, and possibly, a mustache. Smith did not estimate the assailant's weight (App., pp. 11-13).

The only description given by Goeing was that the assailant was a young, light-skinned man wearing tan clothing (App., p. 21).

The police report issued on the night of the robbery described the assailant as a black male, thirty-five years old, five feet nine inches tall, weighing one hundred seventy-five pounds, and wearing a dark "slip-over" shirt (App., p. 5).

Petitioner Watkins was, in fact, seventeen years old at the time of the robbery. (App., p. 13).

4.) The level of certainty demonstrated at the confrontation.

Smith viewed a line-up containing Watkins and two other black males. The other two men had darker skin than Watkins (App., p. 26). Smith stated on cross-examination, "Well, I remember at that particular time [the line-up] saying that I wasn't completely sure at that time. But later, you know, later after I got myself together I knew that, I made, you know, that he was the man." (App., p. 16).

Two police officers brought Watkins to Goeing's hospital room to enable him to make an identification. Goeing was informed that the police were going to let him see someone he could identify (App., pp. 22, 28). Goeing stated, "I said it could have been close enough that it could have been his twin brother, it could have been somebody else." (App., p. 23).

5.) The length of time between the crime and the confrontation.

Smith attended the line-up two days after the robbery (App., p. 14).

The show-up in Goeing's hospital room apparently occurred two days after the robbery (App., pp. 25-26).

1.) The opportunity of the witness to view the criminal at the time of the crime.

Ms. Furgason testified that approximately thirty-five to forty-five minutes elapsed from the time she was abducted to the time she was returned to the automobile (App., pp. 71-73, 80, 85, 96-97). She said she could see her assailant's face from the light outside the Candlelight Bar where they drove before proceeding to the scene of the rape (App., pp. 72, 97).

2.) The witness' degree of attention.

Ms. Furgason stated that she did not pay any attention to the automobile in which she was riding (App., p. 81). Neither the direct nor cross-examination specifically indicates how much attention she paid to the two men with whom she was in the automobile.

3.) The accuracy of the witness' prior description of the criminal.

Detective Rick Sanders testified that Ms. Furgason described the rapist, who was a passenger in the automobile, as a white male, in his thirties, approximately five feet nine inches tall, 180 to 190 pounds, with a rough complexion and tattoos on both arms (App., p. 63). The man was nick-named "Jimbo" (App., p. 63). Her description of the driver of the car was that he was approximately six feet one inch tall, medium-length, light brown hair, 180 pounds, medium complexion, and wearing a mustache. The driver was referred to as "Willie" (App., p. 69).

Detective Sanders also said Ms. Furgason told him that the rapist wore a "tank top" shirt and that he did not recall her saying the rapist wore a mustache (App., pp. 70-71, 101). Ms. Furgason did not describe the tattoos worn by the rapist (App., p. 101).

Ms. Furgason stated that the men with whom she was in the car referred to each other as "Jimbo" and "Willie" (App., p. 79). She described the driver as a tall man with a big build and estimated that he was in his twenties (App., p. 84). She said that the man

who raped her wore a mustache and had hair longer than the length of petitioner Summitt's hair at trial (App., p. 73). She said the rapist wore a "tank top" shirt and had tattoos on the biceps of his arms (App., pp. 97-98).

Petitioner Summitt testified that he was thirty-two years old at the time of the crime (Transcript of Evidence, p. 157, herefter referred to as TE). He stated that he first saw Ms. Furgason in court and that he was required to exhibit the tattoos on his arms to her in a conference room sometime prior to the trial (App., pp. 98-99).

4.) The level of certainty demonstrated at the confrontation.

Ms. Furgason viewed numerous photographs contained in books kept at City and County Police Headquarters (App., pp. 66-68, 75). She said she recognized a photograph of Summitt (App., p. 75). Although the photograph was requested by defense counsel, it was never produced at trial (App., p. 106).

5.) The time between the crime and the confontation.

The rape occurred between 11:30 p.m. on July 20, 1974 and 1:30 a.m. on July 21, 1974 (App., p. 71). Ms. Furgason viewed photographs on July 21, 1974 and again on July 23, 1974 (App., pp. 63, 66-67, 88-90, 92). She made her identification of Summitt's photograph on July 23, 1974 (App., pp. 90-91).

The facts surrounding the crimes and identifications when considered in light of the arguments made in the original Brief for the Petitioners support the petitioners' position that a denial of constitutional due process of law resulted from the failure of the trial courts to conduct a hearing outside the presence of the jury to determine the admissibility of identification evidence.

CONCLUSION

For the reasons set forth in their original brief and in their reply brief the petitioners, John Gregory Watkins and James Willard Summitt, respectfully submit that the denial of a hearing outside the presence of the jury to determine the admissibility of identification evidence warrants a reversal of their convictions and the granting of new trials for each of them.

FRANK W. HEFT, JR.
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
701 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONERS

DANIEL T. GOYETTE
CHIEF DEPUTY PUBLIC DEFENDER
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

CERTIFICATE

I, Frank W. Heft, Jr., counsel for petitioners, hereby certify that three (3) copies of the foregoing Reply Brief for Petitioners were mailed by depositing the same in a United States mailbox, with first class postage prepaid, this 31st day of October, 1980, to Hon. Victor Fox, Counsel for Respondent, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601.

FRANK W. HEFT, JR.

see 79

5951